No. 06-1497

In The
Supreme Court of the United States

VISION CHURCH, UNITED METHODIST, et al.,

Petitioners,

v.

VILLAGE OF LONG GROVE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

STATEMENT OF THE CASE

Summary of Argument

The Village of Long Grove is an 18-square mile community located in Lake County, Illinois. The Village is known for its unique community character and semi-rural planning philosophy. In April 2002, the Village enacted a neutral and generally applicable Public Assembly Ordinance to regulate the location and size of public assembly uses, including both religious institutions and secular assembly uses. Under the size limits set forth in Public Assembly Ordinance, Petitioner could have obtained zoning approval for a 55,000 sq. ft. complex dedicated to religious use at its preferred site in the Village. Petitioner's own architect, who specializes in designing religious institutions, testified that a complex of this size was more than sufficient for Petitioner's 220-person congregation and any realistic future growth of that congregation.

Following the Village's enactment of the Public Assembly Ordinance, Petitioner never sought approval of a facility that complied with the limit on facility size set forth in the Public Assembly Ordinance, nor did it ever seek an amendment to the Ordinance. Instead, Petitioner demanded that the Village vote on its proposed 99,000 sq. ft. complex. It is undisputed that a complex of that size could not be approved under the limits set forth in the Public Assembly Ordinance. Consistent with the terms of

the Public Assembly Ordinance, the Village denied Petitioner's application.

Significantly, the Village did not deny Petitioner its preferred site. The Public Assembly Ordinance merely regulated the size of Petitioner's proposed religious complex, in the same manner as the Ordinance regulated the size of secular assembly-type facilities in the Village. The Seventh Circuit determined that this land use regulation did not violate the Free Exercise Clause, Equal Protection Clause, or the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The Seventh Circuit's decision was not based upon an idiosyncratic interpretation of these constitutional and statutory provisions, nor does the outcome in this case conflict with any other religious land use case decided by a federal appellate court. Rather, by all generally accepted interpretations of the Constitution and RLUIPA, the Village's conduct did not violate Petitioner's rights.

Petitioner's Applications and the Village's Actions

Petitioner's recitation of the facts surrounding its applications materially departs from the discussion of facts contained in the opinions of the Seventh Circuit and the District Court, and from the record compiled in this case. The distortions begin with Petitioner's discussion of events that led to its purchase of the property. For example, when Petitioner was searching for property to purchase, it is not true that the Village Manager and Petitioner's pastor "agreed on a fourth property, which the Manager said was 'the best place to build a church in Long Grove.'" Pet. at 3. *See* Village's Local Rule 56.1(b)(3)(a) Resp. to Pl.'s Amend. Statement of Facts, ¶¶ 91-96 (referencing the

depositions of both the Village Manager and Petitioner's pastor). Indeed, the 27.4-acre property purchased by Petitioner in September 2000 (the "Property") was not even *in* the Village of Long Grove; it was located in unincorporated Lake County, Illinois. *Vision Church v. Village of Long Grove*, 468 F.3d 975, 981 (7th Cir. 2006).

Under Illinois law, Petitioner could have sought development under the County's development ordinances, but it chose to pursue a different course: annexation into the Village. *Id.* at 982. Annexation is not the exercise of land-use authority. Rather, it is the means by which Illinois municipalities secure jurisdiction over property, and a municipality's authority to annex is governed by state statute. "Voluntary" annexation, which Petitioner pursued in 2000 and 2001, is prescribed by 65 ILCS 5/7-1-8. Illinois grants its municipalities wide latitude in negotiating the terms of annexation by way of binding annexation agreements, whose contract-like terms may include provisions relating to the zoning and future development of the property proposed to be annexed. *See* 65 ILCS 5/11-15.1-1 *et seq.*; *Langendorf v. City of Urbana*, 754 N.E.2d 320, 323-24 (Ill. 2001); *Gaylor v. Village of Ringwood*, 842 N.E.2d 1241 (Ill. App. Ct. 2006).

In Petitioner's June 2000 application for annexation, it requested annexation and zoning approval of a 99,000 sq. ft. facility, including a sanctuary that would seat 1,000. *Vision Church* at 982.[1] In the course of negotiations with the Village, Petitioner proposed to reduce its initial,

[1] At this time, Petitioner's congregation consisted of 220 (140 adults and 80 youth and children), *see* Village's Local Rule 56.1(a)(3) Statement of Facts, ¶ 78 (referencing Petitioner's own December 2000 presentation), not 300 (the number set forth in the Petition). *See* Pet. at 2.

"Phase I," development to 56,200 sq. ft., including a sanctuary that would seat 600. *Id.* As negotiations continued, the Village asked Petitioner to clarify its plans and state whether or not it would agree to certain development conditions, including: (i) a restriction on future development beyond the proposed 56,200 sq. ft. and (ii) limitations on the number of weekly events, which was suggested by the Village Manager as a way to address concerns regarding traffic and parking. In an August 6, 2001 letter to the Village, Petitioner declined to accept these proposed conditions of annexation. *Id.* at 982. With negotiations at a stalemate, on August 7, 2001, the Village Plan Commission voted to recommend denial of Petitioner's application for annexation. On August 14, 2001, that recommendation was accepted by the Village Board. *Id.* at 982-83.[2]

While Petitioner was pursuing annexation, a neighboring property owner ("Valenti") was also negotiating with the Village to annex his 128-acre parcel, on which he intended a residential development. The Valenti annexation was approved by the Village on October 9, 2001. *Id.* at 983.[3] As a result of the annexation of the Valenti parcel, the Property became fully surrounded by the

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[2] Contrary to Petition's hyperbole, *see* Pet. at 4, the record contains absolutely no evidence that "local residents" viewed Petitioner and its plan "with suspicion" because its congregation was Korean-American. Nor is there any evidence of "some remarks" having "racial overtones." Notably, neither the Seventh Circuit's opinion, nor the District Court's opinion, contains any discussion of these mysterious and inflammatory allegations.

[3] The Seventh Circuit noted that "Vision alleges that the Village 'accelerated public hearings and development approvals' for Valenti's annexation application." *Id.* at 983 n. 4. *See also* Pet. at 6 ("the city [sic] fast-tracked approval of [the Valenti] annexation and 'residential' rezoning"). Although ultimately immaterial, the Village disputes this allegation and the Seventh Circuit made no findings as to its truth.

Village's corporate boundaries. *Id.* Under Illinois law, *see* 65 ILCS 5/7-1-13, the annexation of the Valenti parcel provided the Village with the opportunity to "involuntarily" annex the Property, which the Village did, pursuant to the statute, in October 2001. *Id.* After annexation, the Village classified the Property as "R2" Residential. The R2 zoning classification, which Petitioner had sought in its voluntary annexation petition, allowed Petitioner to seek approval for its proposed religious complex by way of a Special Use Permit. *Id.*[4]

In November 2001, the Village Manager introduced the Public Assembly Ordinance as a proposed amendment to the Village Code. Before then, Village's standards for granting Special Use Permits (codified at § 5-11-6(D) of the Village Code) did not include specific numeric limits on the size of assembly uses. Given the issues raised by Petitioner's application for annexation, the Village Manager thought it appropriate to propose a comprehensive Public Assembly Ordinance that would regulate with specificity the size of all new public assembly uses. Consistent with accepted planning principles, the proposed Public Assembly Ordinance linked the maximum size of a proposed complex to the type of road that would serve the complex. For example, assembly uses that fronted state highways were permitted to be larger than those that fronted county highways or village roads.

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[4] While Petitioner was pursuing its annexation application with the Village, it was also seeking development approval from Lake County. Involuntary annexation into the Village terminated Petitioner's Lake County application. *Id.* at 983 n. 5.

The Public Assembly Ordinance was passed in April 2002.[5] "The Ordinance restricts the size and capacity of buildings used for 'public assembly' such as 'religious institutions' . . . " *Vision Church* at 983. As applied specifically to the Property (which fronts a county road), the Ordinance "provides that a complex comprised of three buildings located on 15 or more acres, but not fronting a state highway, cannot exceed a total square footage of 55,000." *Id.* at 984.

Petitioner badly misstates the legislative history of the Ordinance and its impact on Petitioner's ability to develop the site. *See* Pet. at 7. According to both the Village's professional planner and Petitioner's own architect, the 55,000 sq. ft. limit did not cramp Petitioner's reasonably anticipated expansion. Rather, it allowed Petitioner to construct a complex that *would more than meet its current and future needs. See* Pl's Summary Judgment Exhibit Book III, Tab 61 (Kendig Deposition) at 131-49; Village's Local Rule 56.1(a)(3) Statement of Facts, ¶¶ 73-75, 78-81 (referencing deposition of church architect Tobias). On this factual point, the Seventh Circuit unequivocally agreed, saying

> experts estimate that a facility of this size would be able to meet the needs of an 800 to 1000

[5] In April 2007, the Village comprehensively amended its Zoning Code. The provision entitled Standards for Special Use Permits reproduced in Appendix E of the Petition was previously codified as § 5-11-6(D) and was re-codified as § 5-11-17(E). At the time of passage, the Public Assembly Ordinance was codified as § 5-11-6.1. In the April 2007 comprehensive amendment, the Ordinance was re-codified as § 5-9-12. The version of the Ordinance that appears in the Petition as Appendix F has been edited and is incomplete. Appendix A to this Response contains the full version of the Ordinance at the time of passage.

> member congregation. Vision currently has 120 members. Although we recognize that Vision plans to grow in size, we cannot fathom a situation in which limiting the church to a three-building, 55,000 sq. ft. facility would impose a substantial burden on religious exercise; the congregation would have to increase eight-fold to reach its maximum capacity.

Vision Church at 999-1000.

As the Seventh Circuit opinion also makes clear, subsequent to enactment of the Public Assembly Ordinance, Petitioner never presented a proposal for a complex in the 55,000 sq. ft. range. The 56,200 sq. ft. proposal that Petitioner made in 2001 in connection with its request for annexation was never re-submitted to the Village.[6] Petitioner's proposal for a *99,000 sq. ft* complex was the *only* proposal that Petitioner put on the table in 2002. *Id.* at 984 n. 9. Of course, that proposal was almost double the size allowed under the Public Assembly Ordinance and was, accordingly, denied by the Village. *Id.*

Petitioner chastises the Seventh Circuit for "simply assum[ing] that Vision would have received approval for a 55,000-square foot complex even though the Village had just denied Vision's 56,200-square foot proposal." Pet. at 9-10. Petitioner's criticism is misplaced. The 56,200 sq. ft. proposal (with no commitment to forgo future expansion), made in conjunction with Petitioner's request for annexation, was denied in August 2001. But by April 2002, when

[6] Even that proposal was presented merely as an initial phase of development and the original annexation negotiations broke down because Petitioner *refused* to commit to no future expansion of the facility.

the Village reviewed Petitioner's application for a Special Use Permit, the landscape had significantly changed: (i) the Property had been annexed in the Village, and (ii) the Village had established specific standards for the size of proposed assembly uses. Given the concrete standards set forth in the Public Assembly Ordinance, the Seventh Circuit concluded that "under the [Public Assembly Ordinance], Vision would be permitted to build a 55,000-square foot facility." *Vision Church* at 999.

However, in 2002 Petitioner never sought approval of the proposed 56,200 sq. ft. complex, nor of any facility that complied with the 55,000 sq. ft. limit. It was, at that time, insisting on a *99,000* sq. ft. complex.

The Church and the Public Schools

Petitioner takes exceptional liberties in comparing itself to neighboring public schools built in 1998/1999, prior to the time Petitioner applied for annexation. Petitioner's rendition of the development of these public schools flatly misstates the crucial facts.[7]

Community School District No. 96 (the "School District") owned the 70-acre property on which the public schools were built. At the time of construction, the School District's property was located *outside* of the Village, in unincorporated Lake County. Unlike Petitioner, the School

[7] Petitioner asserts that "in all material respects (except for being smaller), Vision's special use proposal was identical to proposals filed by the local school district for an enormous school complex across the street from Vision's land. * * * Like Vision, the schools district had approached Long Grove for annexation, residential zoning and a special use permit." Pet. at 3.

District did not request that the Village annex the property prior to development. Rather, because its property was unincorporated, the School District properly built its schools under applicable County and State regulations and without regard to the Village's zoning code. *See* Pl's Summary Judgment Exhibit Book II, Tab 41; Village's Local Rule 56.1(a)(3) Appendix of Exhibits (Kendig Dep., pp. 83-84) and Supplemental Appendix of Exhibits (Doughty Dep., pp. 59-61). Further, given the size of the School District's property (over 60 acres), the Village lacked statutory authority to involuntarily annex the property. *See* 65 ILCS 5/7-1-13 (involuntary annexation limited to properties of no more than 60 acres).

Only *after* construction of the school *outside* the Village did the School District approach the Village about annexation. Given that the schools were *already built* and the School District was *willing to agree to certain restrictions on further development if the property were annexed*, the Village voted to approve the annexation. *Vision Church* at 1001, 1003.

The Seventh Circuit also noted that the School District "serve[s] a unique public function." *Vision Church* at 1001. To put a sharper point on this observation, school districts in Illinois are units of local government, Ill. Const. Art. VII, § 1, and the State legislature has placed limits on the authority of municipalities like the Village to control development on public school properties. *See* 105 ILCS 5/2-3.12, 5/3-14.21(d). Thus, the School District and Petitioner were in far different positions *vis-à-vis* the Village's land use authority under State law.

In sum, Petitioner's suggestion that its proposal was "identical" to the School District's proposal ignores both the

nature of the two uses (public schools, compared to a private assembly use), and nature of the zoning requests (requested annexation *after* construction with *agreed* conditions on future development, compared to requested annexation *before* construction *without* agreed conditions on future development). The two proposals were fundamentally different, and the school development cannot be a "valid comparator" to Vision's proposed project. *Vision Church* at 1003.

REASONS FOR DENYING THE PETITION

Although Petitioner asserts that this case exposes great rifts among the lower courts, this is pure exaggeration. Federal appellate courts are not in conflict regarding the meaning and application of the Free Exercise Clause, Equal Protection Clause, and RLUIPA when deciding cases involving proposed religious land uses and municipal zoning laws. Despite some differences in the language used by the appellate courts, the decisions of the Seventh Circuit are entirely consistent with decisions of the Second, Third, Ninth, and Eleventh Circuits.

The facts in this case – including the significant fact that Petitioner was not denied its preferred site, but was merely limited in the size of its proposed development – led to a decisive ruling in favor of the Village. That ruling was not the product of a unique interpretation of the Constitution or RLUIPA by the Seventh Circuit. It was, rather, a ruling fully consistent with First Amendment and Equal Protection decisions of this Court, and with the decisions of other appellate courts in cases with similar fact patterns.

I. The Seventh Circuit Application of RLUIPA's "Substantial Burden" Provision is Fully Consistent With That of Other Circuits.

Contrary to Petitioner's entreaties, there is no "square circuit conflict" between the courts of appeal on the meaning or application of RLUIPA's "substantial burden" provision.[8] *See* Pet. at 11-12. Further, whatever semantic differences exist in the language employed by the courts of appeal, *no* Circuit has found a RLUIPA "substantial burden" violation where a religious institution has been allowed to operate at its preferred site, and has been "burdened" merely by a limit on the size of its proposed complex.

Petitioner's assertion that a wide conflict exists in the interpretation of "substantial burden" is built upon a straw man: the accusation that the Seventh Circuit employs an "effectively impracticable" standard which, according to Petitioner, places it at odds with other Circuits, like the Ninth and Eleventh Circuits, that supposedly employ a "more lenient" standard. *See* Pet. at 11-14. This argument grossly simplifies the Seventh Circuit's approach in "substantial burden" cases, ignores that other Circuits have approvingly cited Seventh Circuit cases, and ducks the question of whether a different standard would lead to a different outcome in *this* case.

A. The Seventh Circuit's "Substantial Burden" Rulings.

In RLUIPA cases, the Seventh Circuit's "substantial burden" analysis begins with *Civil Liberties for Urban*

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[8] 42 U.S.C. § 2000cc(a)(1).

Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003) ("*CLUB*"). In *CLUB*, the plaintiffs raised a facial challenge to Chicago's zoning ordinance, which required religious uses to obtain Special Use Permits in areas of the city zoned "B" (business) and "C" (commercial), and excluded religious uses from areas zoned "M" (manufacturing). *Id.* at 754. With respect to RLUIPA's "substantial burden" provision, the plaintiffs alleged that these restrictions either deprived religious institutions of their preferred locations (in circumstances when the permit was denied) or, at the least, made it more difficult for religious institutions to find land and obtain zoning approval. *Id.* at 761.

The Seventh Circuit noted that the plaintiffs' proposed interpretation of "substantial burden," *i.e.*, "*any* regulation that inhibits or constrains the use, building, or conversion of real property for the purpose of religious exercise," *id.* at 761, would render meaningless the word "substantial." *Id.* The Seventh Circuit went on to hold that a land-use regulation imposes a "substantial burden" only if it "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise – including the use of real property for the purpose thereof within the regulated jurisdiction generally – effectively impracticable." *Id.*

Applying this analysis, the Seventh Circuit found that Chicago's Special Use requirements may well make land acquisition more difficult or more costly for religious institutions, but those "burdens" were the same ones faced by secular developers, and the city's overall treatment of religious uses demonstrated that religious institutions were able to locate and acquire sites in the city. To find a violation of RLUIPA in these circumstances would result in a "free pass" for religious institutions and place religious institutions in a *superior* position vis-à-vis comparable

secular uses. *Id.* at 761-62. Therefore, the Seventh Circuit concluded, Chicago's zoning ordinance did not impose a "substantial burden" on religious institutions.

The Seventh Circuit next addressed RLUIPA's "substantial burden" provision in *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005), a case that Petitioner tellingly neglects to mention in its Petition. In *City of New Berlin*, the plaintiff sought planned development ("PUD") approval to locate a church on property it had purchased in the city. *Id.* at 898. To alleviate concerns that the property might be sold to another user if the church could not raise the necessary funds to construct its facility, the church agreed to several planning conditions designed to prevent any other use of the property. *Id.* Notwithstanding the recommendation of the city's director of planning, the city council rejected the church's proposal based on the assertion that the proposed concessions did not protect the city in the event of certain contingencies. *Id.* at 898-99. The district court found no "substantial burden," but the Seventh Circuit reversed.

As Judge Posner wrote, "the district court judge inferred from language in [*CLUB*] that to satisfy [the 'substantial burden'] requirement the Church would have to show that there was no other parcel of land on which it could build its church." *Id.* at 899. But the Seventh Circuit rejected this interpretation of *CLUB* and the district court's "substantial burden" test. Instead, it held that, even though other sites might be available, the city's land-use decision, which denied the church its preferred site, *did* constitute a "substantial burden" because the reasons for denial offered by New Berlin were disingenuous and

could not be justified by sound land planning principles. *Id.* at 899-900.[9]

Judge Posner also authored *Petra Presbyterian Church v. Village of Northbrook*, ___ F.3d ___, 2007 WL 1628113 (7th Cir.) (June 7, 2007), a case decided after the present Petition was filed. With respect to the interpretation of "substantial burden," *Petra Presbyterian* involved a church that was denied its preferred site because the site in question was located in an industrial park where no assembly uses, religious or secular, were allowed. *Id.* at *2, *5. Commenting generally on the "substantial burden" test, the Seventh Circuit said "unless the requirement of substantial burden is taken seriously, the difficulty of [a municipality] proving a compelling governmental interest will free religious organizations from zoning restrictions of any kind." *Id.* at *5.

In discussing Petra's specific claim, Judge Posner invoked both *CLUB* and *City of New Berlin. Id.* at *5. Drawing on *CLUB*, the Seventh Circuit held that "when there is plenty of land on which religious organizations can build churches . . . in a community, the fact that they are not permitted to build everywhere does not create a substantial burden." Citing *New Berlin,* the Seventh Circuit noted an exception to this rule when a religious institution has a reasonable expectation of obtaining zoning approval and the denial of the requested permit is "so utterly groundless as to create an inference of religious discrimination." *Id.* Because Petra had no reasonable

[9] Given the outcome in *New Berlin*, Petitioner's comment that "Vision, like every other religious group to which the Seventh Circuit . . . has applied [its version of the 'substantial burden'] test failed to establish a substantial burden" *see* Pet. at 12 is patently untrue.

expectation of obtaining zoning approval at the site in question but had other opportunities to locate and build within the Village of Northbrook, and because excluding assembly uses (including religious institutions) from industrial parks was not an "utterly groundless" land-use decision, the Seventh Circuit found no "substantial burden" on the exercise of religion. *Id.*

Unlike *CLUB*, *New Berlin,* and *Petra*, this is not a case about *denial* of a preferred location; it is about a limitation on the *size* of a facility at a preferred location. Nevertheless, the Seventh Circuit's decision in this case fits squarely within the principles articulated in its *CLUB*, *New Berlin,* and *Petra* decisions. Most significantly, Petitioner has other options, including the ability to construct a smaller facility suitable for its current congregation as well as any reasonably anticipated growth. *Vision Church* at 999-1000. Moreover, application of the Village's neutral, generally applicable, Public Assembly Ordinance was not an "utterly groundless" reason to deny the Special Use Permit as was the case in *New Berlin*.

In conclusion, the Seventh Circuit's "substantial burden" decisions have not been based upon rote application of an "effectively impracticable" standard. They have been fact-based and nuanced. In determining whether a "substantial burden" has been imposed, the above cases have taken into account a variety of information, including the availability of alternative sites and alternative configurations, as well as the soundness of the municipality's basis for denial. As discussed below, these are the very same considerations employed by the other Circuits.

B. The Other Circuits Follow the Same Principles as the Seventh Circuit in "Substantial Burden" Cases.

In an attempt to create the illusion of a circuit split, Petitioner selectively quotes from various "substantial burden" cases, but rarely discusses how these cases were *decided*, and fails to note that the principles used to decide cases, as well as the actual rulings, are fully consistent with the Seventh Circuit's principles and decisions.

For example, the Eleventh Circuit has *not* "explicitly repudiated" the Seventh Circuit's RLUIPA "substantial burden" decisions as Petitioner argues. Pet. at 13. Rather, in *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227-28 (11th Cir. 2004), the Eleventh Circuit, just like the Seventh Circuit in *CLUB*, found *no* "substantial burden" when a synagogue was denied its preferred site, while sites within other zoning districts were amply available. The same holds true for the Ninth Circuit which found no substantial burden when a religious college was denied its preferred location. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004) (commenting that "our holding is entirely consistent with the Seventh Circuit's recent ruling in [*CLUB*]").

Likewise, *Guru Nanak Sikh Soc. v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006), is fully consistent with the Seventh Circuit's decision in *New Berlin* insofar as that the plaintiffs in those two cases were given what can only be called "the runaround." When those plaintiffs attempted to comply with the municipalities' suggestions and address the municipalities' stated concerns, the plaintiffs were met with suspect denials that were at odds with sound planning principles. *See Guru Nanak,* 456 F.3d at 989-92 (distinguishing *San Jose Christian* based upon

the fact that the County of Sutter's conduct could be taken as an indication that no approval would ever be granted). Petitioner asserts that *Guru Nanak* "starkly conflicts" with the Seventh Circuit's decision in *Vision Church* because Petitioner faced "easily as much (if not more) uncertainty as to whether future permit applications would be successful." Pet. at 15-16. Not true. The Seventh Circuit concluded that a religious complex meeting the 55,000 sq. ft. limit "likely would be" approved by the Village and, therefore, there was no uncertainty about Vision's ability to locate at its preferred site if it simply complied with the specific standards contained in the Public Assembly Ordinance. *Vision Church* at 999.

Moreover, the common thread in the *Midrash* and *Guru Nanak* decisions lies in those courts' desires to prevent substantial burdens from being imposed upon religious exercise, precepts or beliefs. *See also Thiry v. Carlson,* 78 F.3d 1491 (10th Cir. 1996).

In *Midrash*, the Eleventh Circuit held that a substantial burden is a "pressure that tends to force adherents to *forgo religious precepts.*" In *Guru Nanak*, the Ninth Circuit defined substantial burden as one that is "oppressive" to a significant great extent, or imposes a significantly great restriction or onus *upon religious exercise*. And, in *Thiry*, the Tenth Circuit concluded that a substantial burden is one that has a "tendency to coerce individuals into *acting contrary to their religious beliefs*," or one that "significantly inhibits or constrains, meaningfully curtails, or denies *reasonable opportunities for religious practices.*" The Village's conduct in the present case did not violate any of these yardsticks of substantial burden.

Rather than distancing itself from these rulings, the Seventh Circuit favorably cited them as refining the definition of "substantial burden" in religious land-use cases. *See Vision Church* at 997, n. 18. Consistent with these definitions, the Seventh Circuit found that the Village neither caused Petitioner to forgo its religious precepts, greatly restricted its religious exercise, forced Petitioner to act contrary to its religious beliefs, nor denied Petitioner reasonable opportunities to engage in religious practices. *Vision Church* at 999. As the Seventh Circuit found, Petitioner had a reasonable opportunity to continue the practice of its religion at its chosen site simply by complying with the 55,000 sq. ft. limitation contained in the Assembly Ordinance. *Id.* But Petitioner chose not to.

Finally, the Village notes that the only other Circuit case where *size* of the religious complex, not site, was the main issue, was decided in the same manner as *Vision Church*. *See Westchester Day School v. Village of Mamaroneck*, 386 F.3d 183, 188 (2nd Cir. 2004). In that case, the Second Circuit concluded that there was no substantial burden when the village turned down a religious day school's zoning petition, but a smaller facility might well have satisfied the municipality's concerns.

In conclusion, the supposed split in the resolution of RLUIPA "substantial burden" cases, as argued by Petitioner, turns out not to be a chasm at all. Instead, when deciding these cases, the various Circuits have relied upon similar principles, and the outcome of the cases, though based upon distinct individual fact patterns, dovetail nicely.[10] The Seventh

[10] These RLUIPA "substantial burden" decisions are also consistent with the outcomes in series of pre-RLUIPA Circuit decisions where the courts were called upon to adjudicate zoning disputes between municipalities and

(Continued on following page)

Circuit's *Vision Church* decision fits within established patterns thereby obviating the need for this Court's review.[11]

II. There Is No Need for The Court to Clarify RLUIPA's "Less Than Equal Terms" Provision.

Just as there is no conflict among the circuits with respect to RLUIPA's "substantial burden" provision, there is no "substantial tension between the decisions of the Seventh and Eleventh Circuits interpreting RLUIPA's

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religious institutions and found no First Amendment violations when zoning approval was denied. *See, e.g., Rector, Wardens & Members of the Vestry v. City of New York,* 914 F.2d 348 (2nd Cir. 1990); *Christian Gospel Church, Inc. v. City and County of San Francisco*, 896 F.2d 1221 (9th Cir. 1990); *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820 (10th Cir. 1988); *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, 699 F.2d 303 (6th Cir. 1983). *Cf. Islamic Center of Mississippi, Inc. v. City of Starkville*, 840 F.2d 293 (5th Cir. 1988) (finding violation of the First Amendment when denial of zoning approval effectively excluded mosque from city).

[11] Petitioner asserts that the Seventh Circuit's approach "also conflicts in principle with the Court's own 'substantial burden' decisions." Pet. at 17. Significantly, RLUIPA's "substantial burden" language constitutes a statutory, not constitutional, standard. In cases involving neutral and generally applicable laws and ordinances, which the Seventh Circuit found to be the case here, the constitutional test is rational basis, not "substantial burden." *See Employment Division v. Smith*, 494 U.S. 872 (1990); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act as unconstitutional as applied to the States). Congress' selection of the "substantial burden" standard raises questions regarding the constitutionality of RLUIPA, but those are beyond the scope of the Seventh Circuit's opinion. In addition, although the foregoing discussion debunks Petitioner's claim that there is a split in the Circuits, the Village also notes that since this Court has issued no controlling "substantial burden decisions" in a religious land use context, the Seventh Circuit's *Vision Church* decision does not conflict with any decision of this Court.

equal terms provision." Pet. at 19. In any event, this case – which involves allegations of "less than equal" treatment of a religious assembly use as compared to *public schools*, and in which the church and the public schools projects were reviewed under different circumstances – should not be the vehicle for resolving any uncertainties about RLUIPA's "less than equal terms" provision.[12]

To begin with, it is doubtful that public schools fall within the class of "nonreligious assembl[ies] or institution[s]" that municipalities must treat on "equal terms" as compared to religious institutions. While the "equal terms" provision of RLUIPA was designed to put religious uses on a par with *private* secular assembly uses (*e.g.*, social clubs, lodges, union halls), there is no reason to believe that RLUIPA unequivocally equates religious institutions with public schools, *see*, *e.g.*, *Vision Church* at 1001 ("public schools serve a unique public function"), and no case has so held.

Even if, in general, religious institutions may not be treated on "less than equal terms" as compared to public schools, the Seventh Circuit's decision makes clear why there was no RLUIPA violation in this case: "Vision and the elementary schools were subject to different standards because of the year in which their special use applications were considered compels the conclusion that there was no unequal treatment." *Vision Church* at 1003 (*citing Primera Iglesia Bautista Hispana of Boca Raton v. Broward County*, 450 F.3d 1295, 1310 (11th Cir. 2006)). That is, the Special Use Permit for the School District, which governed future development of the already constructed schools,

[12] 42 U.S.C. § 2000cc(b)(1).

was approved by the Village in July 1999, *more than two years* before the neutral and generally applicable Public Assembly Ordinance was enacted in April 2002.[13] The fact that the schools were *already built* at the time the School District applied for annexation and a Special Use permit is additional conclusive proof that the relief sought by Petitioner and the School District was not equivalent.

The Seventh Circuit's *citation and reliance* upon *Primera Iglesia,* an Eleventh Circuit decision, should put to rest any suggestions of a "tension" between the circuits. Indeed, in *Primera Iglesia* the Eleventh Circuit found no "equal terms" violation because the plaintiff church and the allegedly comparable private school were required to go through *very different zoning approval process* (a re-zoning for the school, versus a variation for the church) and "the 'rezoning' process is an entirely different form of relief from obtaining 'a variance'." *Id.* 450 F.3d at 1301, 1310.[14] Rather than demonstrating tension, the facts and conclusion in *Primera Iglesia* are entirely consistent with the facts and conclusion in *Vision Church.*

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[13] To the extent Petitioner suggests that the Village's very adoption of the neutral and generally applicable Public Assembly Ordinance was a violation of the "less than equal terms" provision simply because it altered the existing regulatory landscape, *see* Pet. at 20, that argument finds no support by any court.

[14] The same is true of the approval processes faced by Petitioner and the District. The schools were built at a time when the School District's property was physically outside the Village's boundaries and, therefore, beyond any Village control. As a result, the statutory "approval" process that the schools went through bore no resemblance to the special use process applicable to Petitioner. *Vision Church* at 1001-02. Further, the Village's authority over development activities of a public school are substantially limited by Illinois statute. *See* 105 ILCS 5/2-3.12, 5/3-14.21(d).

III. There Is No Need for The Court to Clarify the Meaning of the Equal Protection Clause, Especially When Petitioner Brought, and Lost, Claims Under the First Amendment.

After disposing of Petitioner's RLUIPA and First Amendment claims, the Seventh Circuit subjected Petitioner's remaining equal protection claim to rational basis scrutiny. *Vision Church* at 1001. Although, Petitioner asserts that "this case provides the Court with an opportunity to resolve a circuit conflict" as to the appropriate level of scrutiny for equal protection claims, *see* Pet. at 21, this Court has already done so.

In *Locke v. Davey*, 540 U.S. 712 (2004), the plaintiff brought claims under both the religion clauses of the First Amendment *and* the Equal Protection Clause. The Court disposed of the First Amendment claims in favor of the State of Washington and then considered the plaintiff's equal protection claim. In determining the appropriate equal protection standard, the Court said "because we hold . . . that the program is not a violation of the Free Exercise Clause . . . we apply rational-basis scrutiny to his equal protection claims." *Id.* at 721 n. 3. In *Vision Church*, the Seventh Circuit followed this clear direction and applied rational basis scrutiny as well. *Vision Church* at 1001.

Petitioner does not attempt to distinguish *Locke*, it simply ignores this binding precedent. Further, Petitioner cites no post-*Locke* case where any standard other than rational basis has been applied in a comparable situation and, with the exception of Judge Posner's 2003 *dissent* in *CLUB*, it cites no pre-*Locke* case in which heightened scrutiny was applied to an equal protection claim involving a zoning dispute between a religious institution and a municipality.

Petitioner's attempt to manufacture a conflict out of the Third Circuit's decision in *Congregation Kol Ami v. Abington Township*, 309 F.3d 120 (3rd Cir. 2002), is disingenuous as that case *reversed and remanded* a lower court decision that deviated from proper rational basis analysis. In *Congregation Kol Ami,* the Third Circuit did not apply "heightened" equal protection scrutiny; it insisted that the district court apply the "highly deferential" and "very forgiving" rational basis test, *id.* at 133-37, and provided the district court with the necessary direction to carry out that inquiry. *Id.* at 137-43. Indeed, the Seventh Circuit cited *Congregation Kol Ami* with approval when it found that the Village's zoning regulations met the rational basis test. *Vision Church* at 1001.

To the extent that *Congregation Kol Ami* looked to this Court's decision in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), for guidance on application of the rational basis test, the Third Circuit noted that the threshold inquiry is whether the two uses, alleged to have been treated differently, are "similarly situated." *Congregation Kol Ami* at 136-38. This is essentially the same test used in "class of one" equal protection cases, *see Village of Willowbrook v. Olech,* 528 U.S. 562 (2000), and was, in fact, employed by the Seventh Circuit here. *Vision Church* at 1002. For all the reasons discussed in Section II, *supra*, Petitioner and the *public schools* were not "similarly situated."[15] Therefore, the Seventh Circuit found no need for further inquiry and found no equal protection violation. The Seventh Circuit's application of the rational basis test

[15] The same is true for the other allegedly "similar" uses offered by Vision as comparators. *Vision Church* at 1002.

in this case should not be in question, and there is no need for further review by this Court.

IV. Regardless of General Interest in RLUIPA, for All the Above Reasons, *This* Case Is Not Appropriate for Review.

The Village has no doubt that, at some point in time, the Court may find it necessary to provide guidance on RLUIPA and its application to zoning disputes. However, given the facts in this case and the soundness of the Seventh Circuit's decision, this case is not the appropriate vehicle for such an undertaking or worthy of this Court's further attention.

First, there is *no evidence of religious discrimination* in this case. As the Seventh Circuit found, the Village used its traditional zoning power to address potential impacts of large assembly facilities and passed an ordinance that regulated the location and size of *all* public assembly facilities, without regard to the religious practices occurring within the facility. *Vision Church* at 999 ("even if Vision was targeted by the Assembly Ordinance, this does not mean it was targeted *because of religion*: The [Village] was concerned about the size of the church complex and its effect on character of the Village, concerns separate and independent from the religious affiliation (or lack thereof) of the institution seeking to build on the land.") (emphasis in original).

Second, even if RLUIPA's "substantial burden" provision serves to "backstop" the Free Exercise Clause by flagging zoning ordinances and land-use decisions that effectively prevent religious worship, it is undisputed that the 55,000 sq. ft. facility allowed under the Public Assembly Ordinance

would more than amply serve Vision's current and reasonably anticipated need for worship and ministry space. Vision Church at 999-1000.

Third, while a decision clarifying RLUIPA may be of use to potential religious and governmental litigants, the same holds true for many federal statutes where clarification is desired. But there is no need to "definitively establish the legal standards by which land-use decisions are to be judged," Pet. at 29, when the various Circuits are largely in agreement on the outcome of cases with common fact patterns and have established a consistent and recognizable continuum of conduct that is, and is not, permissible under RLUIPA. This is especially true when the Village's conduct in *this case*, viewed in the context of the both the Seventh Circuit's RLUIPA cases and those of other Circuits, was, as the Seventh Circuit found, unequivocally legal and proper.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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